



4000-01-U

DEPARTMENT OF EDUCATION

Arbitration Panel Decision under the Randolph-Sheppard Act

AGENCY: Department of Education.

ACTION: Notice of arbitration decision.

SUMMARY: The Department of Education (Department) gives notice that, on February 14, 2014, an arbitration panel (Panel) rendered a decision in the matter of Kentucky Office of the Blind vs. Department of the Army, Fort Campbell (Case no. R-S/11-06).

FOR FURTHER INFORMATION CONTACT: You may obtain a copy of the full text of the Panel decision from Donald Brinson, U.S. Department of Education, 400 Maryland Avenue, SW., room 5045, Potomac Center Plaza, Washington, DC 20202-2800. Telephone: (202) 245-7310. If you use a telecommunications device for the deaf or a text telephone, call the Federal Relay Service, toll-free, at 1-800-877-8339.

Individuals with disabilities can obtain this document in an accessible format (e.g., braille, large print, audiotape, or compact disc) on request to the contact person listed under FOR FURTHER INFORMATION CONTACT.

SUPPLEMENTARY INFORMATION: The Department convened the Panel under the Randolph-Sheppard Act (Act), 20 U.S.C.

107d-1(b), after receiving a complaint from the Kentucky Office of the Blind, the State licensing agency (SLA) designated to administer the Randolph-Sheppard program in Kentucky. Under section 107d-2(c) of the Act, the Secretary publishes in the Federal Register a synopsis of each Panel decision affecting the administration of vending facilities on Federal and other property.

Background

The Department of the Army, Fort Campbell (Army) used contractors through the SLA for several years because most of the Army's cooks located at the base were deployed. Thus, the Army had to contract for cooks to provide food service to those located on the base. As the number of troops deployed decreased, the cooks from Fort Campbell returned to the base. Military personnel began to perform multiple tasks, including selecting the menus, preparing and cooking the food, ordering supplies, maintaining quality control of all food prepared and served, maintaining equipment, conducting headcount of soldiers served, and noting accountability of cash received. While these duties had been performed by the SLA, due to these changes, the Army no longer needed to have a contractor provide these services. However, the Army still had a need for a contractor to perform certain services because

soldiers are precluded by Army Regulation 30-22 from performing dining facility attendant duties in a garrison environment.

The Performance Work Statement outlined the duties the contractor would now be required to perform. According to the Panel's decision:

[T]he contractor is to "hire and staff of qualified personnel . . . provide an on-site contract manager and with full authority to obligate the company and be responsible for overall performance . . . provide all employees with uniforms . . . establish and maintain a comprehensive quality control plan . . . train employees . . . maintain certificates and records . . . operate, and clean after each use, mechanical vegetable peeling machine . . . requisition, wash, peel and cut potatoes and fruit."

The Army Contracting Officer concluded that the required services did not fall within the scope of the Act.

Because of the Army Contracting Officer's decision, the SLA filed a request for arbitration with the Department contending the Army violated the Act and its applicable regulations, in 34 CFR part 395, when it issued this solicitation without applying the provisions of the Act to the Army's source selection process. The matter was then submitted to the Panel.

Synopsis of the Panel Decision

A similar issue had arisen at Fort Campbell in the late 1990s. In 2002, an arbitration panel concluded that the services described in that Performance Work Statement fell within the terms of the Act. The Panel was asked whether the 2002 decision was binding through the principle of res judicata, given the similarity of issues and parties. The Panel concluded unanimously that the 2002 decision was not binding on the Panel because there had been several judicial rulings and pronouncements by Congress since the earlier case was decided. The Panel decided, however, to give that case "respectful consideration."

The Army argued that the Panel should give great deference to the decision of the Contracting Officer. The Panel majority disagreed with that argument. While there was no disagreement that the Army had full authority to have its own cooks handle food preparation and manage the dining facility, the issue was whether the Army's conclusion that the remaining work was not covered by the Act was correct. The Panel determined that resolution of the issues in this case involved statutory interpretation, and, because the Department is charged with interpreting the Act, by extension, so is the Panel.

The remaining question then was whether the Act was intended to apply to the discrete dining facility attendant services that were to be provided at the dining halls at Fort Campbell. The Panel majority noted that because interpretations had changed over the years, to understand what the Act, as it stands today, was intended to cover, it had to explore this history. As a result, the Panel reviewed and discussed the 1974 Amendments, various pronouncements from the Department and the Comptroller General's various court decisions, the relationship between the Act and the Javits-Wagner-O'Day Act (JWOD), and the passage of the National Defense Authorization Act of 2007 (NDAA).

The majority ultimately concluded the Act applies to this solicitation at Fort Campbell. In reaching that conclusion, the Panel rejected the Army's assertion that Washington State Department of Services for the Blind v. United States, 58 Fed. Cl. 781 (2003), was binding on the Panel. The Panel determined that the Washington case was limited to just "busboy" services, whereas the Fort Campbell solicitation also involved food handling. The Panel also discussed the impact of the NDAA and the interplay between the services covered by the Act and JWOD. In determining that the NDAA defined food services to

include mess attendant services, the Panel concluded that this "impliedly indicated those services are covered by the [Act]."

Finally, in rejecting the argument that the NDAA did not apply because the contract in effect at Fort Campbell was not awarded under the Act, the Panel concluded that the NDAA was still a "pronouncement by Congress as to the coverage of the [NDAA] and is, therefore, a significant factor here." The Panel then concluded that had the Army complied with the earlier arbitration panel ruling in 2002, "the contract for [mess attendant] services in 2006 would have been issued under the [Act]."

For the reasons stated in the decision, the Panel found that the Army violated the Act when it issued the solicitation for Dining Facility Attendant Services at Fort Campbell without applying the provisions of the Act to the Army's source selection process. In terms of a remedy, the Panel recognized that the Act requires that, when a violation has been found, the Federal agency must "cause such acts or practices to be terminated promptly and shall take such other action as may be necessary to carry out the decision of the panel." The Panel directed the Army to notify the current contractor that its contract would not be renewed at expiration and to begin negotiations with the

SLA for services to commence upon the expiration of the current contract.

One panel member concurred in part and dissented in part.

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Dated: April 13, 2017.

Ruth E. Ryder,
Deputy Director, Office of Special
Education Programs, delegated the
duties of the Assistant Secretary
for Special Education and
Rehabilitative Services.

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